

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 7: The Republican Era – Foundations/Scope/Incorporation

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**Hurtado v. California, 110 U.S. 516 (1884)**

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*Joseph Hurtado, in a drunken rage, fatally shot a man who was having an affair with his wife. In California, a person could be required to stand trial either after a formal indictment by a grand jury or after a process known as an "information." This process required a judicial decision after a preliminary hearing determined whether probable cause existed to move forward with an actual trial. Hurtado was convicted and sentenced to death. His appeal claimed that the due process clause of the Fourteenth Amendment required California to try him only after a formal grand jury indictment.*

*The Supreme Court by a 7-1 decision, concluded that the Fourteenth Amendment did not require that the states follow the same procedures as the federal government. Justice Matthews insisted that the due process clause of the Fourteenth Amendment did not "incorporate" any provision in the Bill of Rights. Why did he reach this conclusion? Why did Justice Harlan disagree? Who has the better argument? Is allowing this kind of diversity among the states reasonable? What standards should the courts use to resolve cases like this?*

JUSTICE MATTHEWS delivered the opinion of the Court. . . .

It is claimed on behalf of the prisoner that the conviction and sentence are void on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

Nor shall any State deprive any person of life, liberty, or property without due process of law.

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which, accordingly, it is forbidden to the States respectively to dispense within the administration of criminal law.

The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States.

. . . [I]t is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that, by immemorial usage, it has acquired a fixed, definite, and technical meaning; that it refers to and includes not only the general principles of public liberty and private right which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being

by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

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The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that, in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age, and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

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We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself. [It then immediately adds:] or be deprived of life, liberty, or property, without due process of law.

According to a recognized canon of interpretation especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible that, when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent, and that, if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

The Fourteenth Amendment . . . does not profess to secure to all persons in the United States the benefit of the same law and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line, there may be a right of trial by jury, and, on the other side, no such right. Each State prescribe its own mode of judicial proceeding.

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case . . . Arbitrary power,

enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. . . .

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It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

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Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. . . . It is merely a preliminary proceeding, and can result in no final judgment except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

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JUSTICE HARLAN, dissenting.

... As I cannot agree that the state may, consistently, with due process of law require a person to answer for a capital offense, except upon the presentment or indictment of a grand jury, and as human life is involved in the judgment rendered here, I do not feel at liberty to withhold a statement of the reasons for my dissent from the opinion of the court.

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"Due process of law," within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words "due process of law," in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government. What was that interpretation? In seeking that meaning we are, fortunately, not left without authoritative directions as to the source, and the only source, from which the necessary information is to be obtained.

...

... [A]ccording to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not consistent with the "law of the land" or with due process of law. Such was the understanding of the patriotic men who established free institutions upon this continent. Almost the identical words of Magna Charta were incorporated into most of the state constitutions before the adoption of our national constitution. When they declared, in substance, that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land, they intended to assert his right to the same guaranties that were given in the mother country by the great charter and the laws passed in furtherance of its fundamental principles.

My brethren concede that there are principles of liberty and justice lying at the foundation of our civil and political institutions which no state can violate consistently with that due process of law required by the fourteenth amendment in proceedings involving life, liberty, or property. Some of these principles are enumerated in the opinion of the court. But for reasons which do not impress my mind as satisfactory, they exclude from that enumeration the exemption from prosecution, by information, for a public offense involving life. By what authority is that exclusion made? Is it justified by the settled usages and modes of proceeding existing under the common and statute law of England at the emigration of our ancestors, or at the foundation of our government? Does not the fact that the people of the original states

required an amendment of the national constitution, securing exemption from prosecution for a capital offense, except upon the indictment or presentment of a grand jury, prove that, in their judgment, such an exemption was essential to protection against accusation and unfounded prosecution, and therefore was a fundamental principle in liberty and justice? . . .

But it is said that the framers of the constitution did not suppose that due process of law necessarily required for a capital offense the institution and procedure of a grand jury, else they would not in the same amendment prohibiting the deprivation of life, liberty, or property without due process of law, have made specific and express provision for a grand jury. . . . This line of argument, it seems to me, would lead to results which are inconsistent with the vital principles of republican government. If the presence in the fifth amendment of a specific provision for grand juries in capital cases, alongside the provision for due process of law in proceedings involving life, liberty, or property, is held to prove that "due process of law" did not, in the judgment of the framers of the constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be likewise held that the right not to be put twice in jeopardy of life and limb, for the same offense, nor compelled in a criminal case to testify against one's self,—rights and immunities also specifically recognized in the fifth amendment,—were not protected by that due process of law required by the settled usages and proceedings existing under the common and statute law of England at the settlement of this country. . . . If the argument of my brethren be sound, those rights—although universally recognized at the establishment of our institutions as secured by that due process of law which for centuries had been the foundation of Anglo-Saxon liberty—were not deemed by our fathers essential to the due process of law prescribed by our constitution; because,—such seems to be the argument,—had they been regarded as involved in due process of law they would not have been specifically and expressly provided for, but left to the protection given by the general clause forbidding the deprivation of life, liberty, or property without due process of law. Further, the reasoning of the opinion indubitably leads to the conclusion that . . . the clause of the fourteenth amendment forbidding the deprivation of life or liberty without due process of law would not be violated by a state regulation dispensing with petit juries in criminal cases, and permitting a person charged with a crime involving life to be tried before a single judge, or even a justice of the peace, upon a rule to show cause why he should not be hanged.

It is said by the court that the constitution of the United States was made for an undefined and expanding future, and that its requirement of due process of law, in proceedings involving life, liberty, and property, must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the state which adopts it has entered upon an era of progress and improvement in the law of criminal procedure. . . . [O]ne of the peculiar benefits of the grand-jury system, as it exists in this country, is that it is composed, as a general rule, of private persons who do not hold office at the will of the government, or at the will of voters. In most, if not all of the states, civil officers are disqualified to sit on grand juries. In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies. "The grand juries perform," says Story, "most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government or by political partisans, or by private enemies." Story, Const. 1785.

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JUSTICE FIELD did not take part in the decision of this case.